Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-974 OF 1994
ABDUL MALIK ISHAK J
18 MARCH 1995

Civil Procedure *— Originating summons — Striking out — Whether failure to file affidavit in reply fatal — Whether failure amounts to admission of facts alleged — Whether O 92(1) of the Rules of the High Court 1980 should be invoked — Rules of the High Court 1980 O 92(1)*

Civil Procedure *— Locus standi — Declaration against city council — Application for declaration that planning permission void and ineffective — Whether being ratepayer and road-user sufficient — Whether evidence of infringement of plaintiff's private or legal right required — Rules of the High Court 1980 O 15 r 16*

Civil Procedure *— Originating summons — Declaration — Whether planning permission void — Whether plaintiff entitled to receive reply from city council concerning notices to adjoining landowners — Whether plaintiff had locus standi — Whether leave of court necessary — Whether an abuse of process of court — Rules of the High Court 1980 O 53*

Civil Procedure *— Affidavits — Need to file affidavit in reply — Whether failure amounts to admission of facts alleged*

The plaintiff filed an originating summons seeking, inter alia, a declaration that the planning permission granted to Johor Coastal Development Sdn Bhd ('JCD') by the defendant to develop a floating city in Johor Bahru was null and void because it was contrary to s 70 of the Street, Drainage and Building Act 1974 ('the Act') and byelaw 13(1) of the Uniform Building By-Laws 1984. The defendant filed an affidavit to which the plaintiff did not reply. The plaintiff stated that he was entitled to a reply to his letter to the defendant which enquired whether the defendant had given notice to the owners of lands adjoining the proposed floating city under s 21(6) of the Town and Country Planning Act 1976. The defendant then filed this application by way of summons-in-chambers to strike out the plaintiff's originating summons on the grounds that: (i) the plaintiff's failure to file an affidavit in reply to that filed by the defendant was fatal and the court should exercise its discretion under O 92 r 4 of the Rules of the High Court 1980 ('RHC'); (ii) the plaintiff had no locus standi to maintain an action against the defendant; (iii) the plaintiff's application disclosed no reasonable cause of action and was an abuse of the process of the court under O 18 r 19(1)(a) of the RHC; and (iv) since the plaintiff had no locus standi, he was not entitled to a reply to his letter from the defendant.

Held, striking out the originating summons with costs:

(1) The whole case had to be decided on affidavit evidence alone and thus the plaintiff should have filed an affidavit in reply as he

must have realized the importance of replying to the defendant's affidavit. Consequently, the failure of the plaintiff to do so meant that he admitted to the defendant's allegation. Affidavits play a crucial role in originating summonses as submissions and decisions are primarily hinged on affidavit evidence.

(2) The court would not apply O 92 r 4 of the RHC to all cases indiscriminately but was duty-bound to determine the issues in dispute so far as they affected the rights and interests of the parties.

(3) For a plaintiff to found an action against a public body, he must show that he has suffered a peculiar damage by the alleged public wrong and that he has a genuine private interest to protect. The plaintiff failed to show that he had suffered damage as a result of the construction of the floating city by JCD by way of nuisance or trespass except to say that he was aggrieved as a ratepayer and road-user. In order to have locus standi, the plaintiff must show that his private rights had been infringed or that he had suffered a special damage over and above any infringement of his public rights. Even assuming there were breaches of the relevant byelaws by the defendant when it approved JCD's plan to develop the floating city, the plaintiff must positively show that his legal rights or interests would be affected. The plaintiff failed to prove this and, consequently, had no locus standi in these proceedings.

(4) A declaration can only be made after proper argument and will not be granted to a plaintiff whose claim is too indirect and insubstantial and would not relieve him from any disadvantage or difficulty. Furthermore, the plaintiff's application was an attempt to circumvent the requirement for leave in O 53 of the RHC as his third prayer was more in the nature of mandamus. As such, the originating summons by the plaintiff amounted to nothing more than an abuse of the process of the court and was struck out under O 18 r 19(1)(a) and (d) of the RHC.

(5) The crucial word in s 21(6) of the Town and Country Planning Act 1976 is the word 'adjoining'. It was obvious that the plaintiff's house was not located on land adjoining the project undertaken by JCD. The plaintiff's house was far from the floating city and, therefore, he was not an adjoining landowner to enable him to assert positively that his legal position would be affected by the planning permission that was granted to JCD by the defendant. Hence, the plaintiff had no locus standi and was not entitled to a reply from the defendant to his letter.

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu saman pemula menuntut, antara lain, suatu deklarasi bahawa kebenaran merancang yang diberikan kepada Johor Coastal Development Sdn Bhd ('JCD') oleh defendan untuk membangunkan suatu kota terapung di Johor Bahru adalah batal dan tidak sah kerana ia bertentangan dengan s 70 Akta Jalan,

A Parit dan Bangunan 1974 dan undang-undang kecil 13(1) Undang-Undang Kecil Bangunan Seragam 1984. Defendan telah memfailkan suatu affidavit yang tidak dibalas oleh plaintif. Plaintif mengatakan bahawa beliau adalah berhak untuk diberi jawapan kepada suratnya yang menanyakan sama ada defendan telah memberi notis kepada
B pemunya-pemunya tanah yang bersempadanan dengan kota terapung yang dicadangkan itu di bawah s 21(6) Akta Perancangan Bandar dan Desa 1976. Defendan kemudiannya memfailkan permohonan ini secara saman dalam kamar untuk membatalkan saman pemula plaintif atas dasar bahawa: (i) kegagalan plaintif untuk memfailkan afidavit jawapan kepada afidavit yang telah difailkan oleh defendan
C telah membawa padah dan mahkamah harus menggunakan budi bicaranya di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (ii) plaintif tidak mempunyai locus standi untuk mengekalkan suatu tindakan guaman terhadap defendan; (iii) permohonan plaintif tidak mendedahkan apa-apa kausa tindakan yang munasabah dan adalah suatu penyalahgunaan proses mahkamah
D di bawah A 18 k 19(1)(a) KMT; dan (iv) memandangkan plaintif tidak mempunyai locus standi, beliau tidak berhak untuk diberi jawapan kepada suratnya oleh defendan.

Diputuskan, membatalkan saman pemula itu dengan kos:

E (1) Keseluruhan kes ini perlu diputuskan hanya atas keterangan afidavit dan oleh itu plaintif harus memfailkan suatu afidavit jawapan kerana beliau sudah tentu sedar akan pentingnya menjawab kepada afidavit defendan. Oleh yang demikian, kegagalan plaintif untuk berbuat demikian bermakna beliau
F mengakui apa yang dikatakan oleh defendan. Afidavit memainkan peranan penting dalam saman pemula kerana penghujahan dan keputusan bergantung terutamanya pada keterangan afidavit.

(2) Mahkamah tidak akan menggunakan A 92 k 4 KMT secara sembarangan untuk semua kes tetapi berkewajipan untuk menentukan isu-isu yang dipertikaikan sejauh mana ia melibatkan
G hak dan kepentingan pihak-pihak itu.

(3) Supaya seorang plaintif boleh membawa suatu tindakan guaman terhadap sesuatu badan awam, beliau perlu menunjukkan bahawa beliau telah mengalami kerosakan khas oleh kesalahan awam yang dikatakan itu dan bahawa beliau mempunyai kepentingan
H persendirian sebenar untuk dilindungi. Plaintif telah gagal menunjukkan bahawa beliau telah mengalami kerosakan akibat pembinaan kota terapung itu oleh JCD secara kacau-ganggu atau pencerobohan kecuali dengan mengatakan bahawa beliau adalah terkilan sebagai seorang pembayar kadaran dan pengguna
I jalan. Supaya mempunyai locus standi, plaintif perlu menunjukkan bahawa hak persendiriannya telah dicabuli atau beliau telah mengalami kerosakan khas yang melebihi sebarang pencabulan hak awamnya. Walaupun dianggap terdapat perlanggaran undang-undang kecil yang relevan oleh defendan apabila ia meluluskan rancangan JCD untuk membangunkan kota terapung itu, plaintif

perlu menunjukkan secara positif bahawa hak atau kepentingannya di sisi undang-undang akan terjejas. Plaintif telah gagal membuktikan ini dan, oleh yang demikian, beliau tidak mempunyai locus standi dalam prosiding ini.

(4) Sesuatu deklarasi hanya boleh dibuat setelah hujah yang sewajarnya dikemukakan dan tidak akan diberikan kepada seorang plaintif yang mempunyai tuntutan yang terlalu tidak langsung dan tidak kukuh dan tidak akan membantu beliau mengatasi apa-apa keburukan atau kesulitan. Lagipun, permohonan plaintif adalah suatu percubaan untuk memintasi keperluan A 53 KMT memandangkan permohonan ketiga beliau lebih bersifat suatu mandamus. Oleh itu, saman pemula plaintif hanya merupakan suatu penyalahgunaan proses mahkamah dan dibatalkan di bawah A 18 k 19(1)(a) dan (d) KMT.

(5) Perkataan yang penting dalam s 21(6) Akta Perancangan Bandar dan Desa 1976 ialah perkataan 'bersempadanan'. Adalah jelas bahawa rumah plaintif tidak terletak atas tanah yang bersempadanan dengan projek yang diusahakan oleh JCD. Rumah plaintif terletak jauh dari kota terapung itu dan, oleh itu, plaintif bukan seorang pemunya tanah yang bersempadanan untuk membolehkan beliau menegaskan secara positif bahawa kedudukannya di sisi undang-undang akan terjejas oleh kebenaran merancang yang diberikan kepada JCD oleh defendan. Justeru itu, plaintif tidak mempunyai locus standi dan tidak berhak untuk mendapat jawapan daripada defendan kepada suratnya.]

[*Editorial Note*: The plaintiff has filed an appeal to the Court of Appeal.]

Notes

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2290.

For cases on originating summonses, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

For cases on the construction of the word 'adjoin', see *Words and Phrases Legally Defined* (Butterworths, 1987) at p 40 and *Words and Phrases Legally Defined* (1993 Supplement) at p 6.

Cases referred to

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629; [1983] 2 All ER 346; [1983] 2 WLR 735 (distd)

Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor [1994] 2 MLJ 297 (refd)

Alfred Dunhill Ltd v Sunoptic SA [1979] FSR 337 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (folld)

Amir Kahar bin Tun Haji Mustapha, Datuk (Datu) v Tun Mohd Said bin Keruak [1994] 3 MLJ 737 (folld)

District Council Central, Province Wellesley v Yegappan [1966] 2 MLJ 177 (folld)
Domer v Gulf Oil (Great Britain) Ltd (1975) 119 SJ 392 (refd)
Dyson v A-G [1911] 1 KB 410 (refd)
Ecclesiastical Commissioners for England's Conveyance, Re [1936] Ch 430; [1934] All ER Rep 118 (refd)
Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12 (folld)
Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536; [1914–15] All ER Rep 24 (refd)
Ikebife Ibeneweka & Ors v Peter Egbuna & Anor [1964] 1 WLR 219 (refd)
Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor [1994] 3 MLJ 640 (distd)
Letang v Cooper [1965] 1 QB 232; [1964] 2 All ER 929; [1964] 3 WLR 573 (refd)
Lim Cho Hock v Goverment of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148 (distd)
MacDonald v Glasgow Corp (1960) SLT 21 (refd)
Metzger & Ors v Department of Health and Social Security [1977] 3 All ER 444; [1978] 1 WLR 1046 (refd)
Othman Saat, Tan Sri Haji v Mohamed bin Ismail [1982] 2 MLJ 177 (distd)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (folld)
R v Hodges (1829) 173 ER 1182 (refd)
Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223 (not folld)
Tengku Jaafar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 (distd)
Thorne Rural District Council v Bunting [1972] Ch 470; [1972] 1 All ER 439; [1972] 2 WLR 517 (folld)

Legislation referred to

Street, Drainage and Building Act 1974 ss 3, 70(1), 72(1)(b)
Town and Country Planning Act 1976 s 21(6)
Rules of the High Court 1980 O 15 r 16, O 18 r 19(1)(a), (d), O 41, O 53, O 92 r 4
Uniform Building By-Laws 1984 byelaw 13(1)
Town and Country Planning Act 1947 s 10(2)(b) [UK]

Abdul Razak Ahmad (*Abdul Razak Ahmad & Associates*) for the plaintiff.
Roger Tan Kor Mee (*Nik Saghir & Ismail*) for the defendant.
Abdul Alim Abdullah (State Legal Adviser) holding a watching brief for the State Government of Johor.
Chin Yew Meng (*Allen & Gledhill*) holding a watching brief for Johor Coastal Development Sdn Bhd.

YM Ungku Faridah Ungku Aziz (Legal Adviser) holding a watching brief for Majlis Bandaraya Johor Bahru. A

Abdul Malik Ishak J: This was an application by the defendant by way of summons-in-chambers (encl 9) to strike out the plaintiff's originating summons (encl 4) wherein the plaintiff sought the following prayers: B

1 Satu deklarasi bahawa kelulusan kebenaran merancang ('planning permission') bagi projek Kota Terapung di Selat Tebrau yang telah diluluskan pada 12 Januari 1994 oleh defendan kepada Johor Coastal Development Sdn Bhd adalah tidak sah dan tidak berkuatkuasa kerana ianya bercanggah dengan Akta Perancangan Bandar dan Desa 1976.

2 Kebenaran jika ada, yang telah diberi oleh defendan kepada Johor Coastal Development Sdn Bhd untuk memulakan kerja-kerja pembangunan di projek Kota Terapung adalah tidak sah kerana melanggar Akta Jalan, Parit dan Bangunan 1974 dan Undang-Undang Kecil Bangunan Seragam 1984. C

3 Bahawa plaintif berhak mendapat jawapan daripada defendan mengenai surat yang telah dikemukakan kepada defendan yang bertarikh 7 September 1994. D

4 Kos.

5 Apa-apa relief yang difikirkan sesuai dan adil oleh mahkamah yang mulia.

E

At the outset, Encik Roger Tan Kor Mee acting for the defendant raised a preliminary objection to the effect that prayer 1 of the plaintiff's originating summons in encl 4 had gone stale and became academic and therefore it was a sheer waste of judicial time to proceed with the hearing of encl 4. It seemed that the planning permission dated 12 January 1994 granted to the Johor Coastal Development Sdn Bhd ('JCD') by the defendant to develop F the floating city had lapsed on 11 January 1995, and the defendant had issued a fresh planning permission to JCD on 12 January 1995. These facts could be gleaned from the further affidavit of the defendant affirmed through Dato' Hj Hashim Bin Hj Yahaya, the Dato' Bandar himself (encl 12).

G

Encik Abdul Razak Ahmad, in his personal capacity as the plaintiff, submitted that the originating summons in encl 4 dated 19 November 1994 was supported by an affidavit of the plaintiff himself dated 17 November 1994 as opposed to the further affidavit of the Dato' Bandar (encl 12) which was affirmed on 20 January 1995 and, consequently, he H submitted that when the originating summons in encl 4 was filed, the planning permission granted to JCD was still valid and what was sought then in prayer 1 was perfectly legitimate and not academic in nature. Alternatively, he submitted that even if prayer 1 to encl 4 was, by effluxion of time, academic and a waste of judicial time to adjudicate upon, yet prayers 2 and 3 of encl 4 were good and valid as they were under a I different set of laws and should be adjudicated upon.

In an emotional outburst, Encik Abdul Razak Ahmad submitted that he disliked going to court and if the defendant had answered his letter as reflected in exh ARA1 in encl 3, he would not have pursued the matter

further. He submitted that Johor Bahru did not belong to the Dato' Bandar who could be removed from office at any time; the ratepayers were entitled to be heard and the manner in which the defendant was managed left much to be desired.

The defendant's counsel drew the court's attention to the failure of the plaintiff to file an affidavit in opposition to that filed by the Dato' Bandar in encl 12 and he submitted that this was fatal. Raja Azlan Shah J, (as His Majesty then was) in *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 at p 224 speaking for the Federal Court had this to say on the duty to file an affidavit in opposition:

> The appellants did not file any affidavit. Pausing here for a moment, I agree with the learned judge that omission to file an affidavit in reply was not fatal to the appellants' case as they were not obliged to do that.

Here, the crucial question to ask is this: Was the plaintiff obliged to file an affidavit in reply to encl 12 as filed by the Dato' Bandar? Obviously, the whole case had to be decided on affidavit evidence alone and thus the plaintiff should have filed an affidavit in reply as he must have realized the importance of replying to the Dato' Bandar's affidavit. Consequently, the failure of the plaintiff in filing an affidavit in opposition would mean that the plaintiff admits to what was alleged in encl 12 (*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332). Way back in 1986, Lee Hun Hoe CJ (Borneo) (as he then was) said in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382:

> There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.

In my judgment, affidavits play a crucial role in originating summonses as submissions and decisions are primarily hinged on affidavit evidence. I am sure the plaintiff being a lawyer should know the value of affidavit evidence in an application of this nature. He should know and cannot be said not to know that affidavits should contain facts known to him and not legal arguments and submissions of law (*Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at pp 352 and 373). It is germane to mention that the basic rules of affidavit practice are contained in O 41 of the Rules of the High Court 1980 ('RHC') and legal practitioners are encouraged to refer to it.

Next, to ground their preliminary objection, the defendant argued that O 92 r 4 of the RHC should be invoked so as to vest the court with the 'inherent powers ... to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court'. The plaintiff argued that the very drastic power as set out in O 92 r 4 of the RHC should be sparingly used. I agree. The court will certainly not apply O 92 r 4 of the RHC to all cases indiscriminately. The court is duty-bound to determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

Since prayers 2 and 3 of the plaintiff's originating summons (encl 4) were quite distinct from prayer 1 thereof, I had no choice but to disallow

the preliminary objections. As agreed by both parties, I had first to decide on the defendant's application in encl 9 before proceeding to encl 4. The method of tackling the issues, as will soon be seen, serves both parties well as all the facts were scrutinized, argued and placed before the court for adjudication.

The defendant's application in encl 9 was grounded on O 18 r 19(1)(a) of the RHC ('it discloses no reasonable cause of action') and under O 18 r 19(1)(d) of the RHC ('it is otherwise an abuse of the process of the Court'). The defendant did not file any affidavit in support of their application as they felt, rightly so, that no affidavit was required to support an application under O 18 r 19 of the RHC (*Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak* [1994] 3 MLJ 737).

The Dato' Bandar, on behalf of the defendant and in his affidavit at encl 7 which was affirmed on 27 December 1994 and subsequently corrected by a corrective affidavit at encl 8, aptly described the plaintiff as a busybody ('sebagai seorang menjaga tepi kain'). The Dato' Bandar must have been prompted to describe the plaintiff as such in view of the previous originating summons No 24–121–94 filed by the plaintiff against the Johor State Government on the same subject matter but on different grounds (see *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297). Incidentally, the plaintiff had also filed another originating summons No 24–830 of 1993 citing the Ketua Pengarah, Kementerian Sains, Teknologi dan Alam Sekitar as a defendant in an attempt to obtain a 'laporan penilaian kesan alam sekitar mengenai projek pembinaan Kota Terapung di Selat Tebrau yang akan dimajukan oleh Johor Coastal Development Sdn Bhd' and he succeeded in his endeavour before the High Court, Johor Bahru. Thus, it was not surprising that when the Dato' Bandar received a letter by hand dated 7 September 1994 from the plaintiff as reflected in exh ARA1 of encl 4, the Dato' Bandar remained silent — too scared to reply. That letter was worded thus:

Serahan tangan 7 September 1994

Yang Berbahagia
Dato Bandaraya Johor Bahru
Majlis Bandaraya
Johor Bahru.

Yang Berhormat Dato'

Projek Kota Terapung di Selat Tebrau

Kami mewakili Encik Abdul Razak yang tinggal di alamat No 26, Jalan Rubi, Taman Kolam Air, Johor Bahru dan kami telah diarah sebagai seorang penduduk di Bandar Johor Bahru beliau telah terjejas dengan pembangunan 'Kota Terapung', satu projek penswastaan yang sedang dilaksanakan secara usahasama oleh Johore Coastal Development Sdn Bhd dan Kerajaan Negeri Johor.

Kami selanjutnya telah diarahkan bahawa projek Kota Terapung itu terletak dalam kawasan pihak berkuasa tempatan (local planning authority area) yang mana Majlis Bandaraya Johor Bahru mempunyai kuasa dari segi undang-undang untuk mengatur, mengawal dan merancang pembangunan dan penggunaan tanah dan bangunan di kawasan projek tersebut.

Pelanggan kami juga difahamkan Majlis Bandaraya Johor Bahru telah meluluskan permohonan Johore Coastal Development Sdn Bhd untuk kebenaran merancang (planning permission) di kawasan projek berkenaan dan pihak Majlis Bandaraya Johor Bahru sebagai pihak berkuasa perancang tempatan telah meluluskannya pada 12 haribulan Januari 1994.

Kami selanjutnya telah diarahkan untuk mendapat pengesahan daripada Dato' perkara-perkara berhubung dengan kebenaran merancang yang telah diluluskan oleh Majlis Bandaraya Johor Bahru khususnya perkara-perkara seperti berikut:

(i) sudahkah Majlis Bandaraya Johor Bahru memberi notis kepada tuan-tuan punya tanah yang berhampiran dengan kawasan projek tersebut sebagaimana yang dikehendaki di bawah s 21(6) Akta Perancang Bandar dan Desa 1976 (Akta 172); dan

(ii) jika tindakan memberi notis secara bertulis sudah dilaksanakan, bilakah notis tersebut diserahkan kepada tuan-tuan punya tanah yang berkenaan.

Kami merasa sukacita jika dapat Dato' memberi pengesahan kepada pertanyaan kami itu dengan kadar segera dan tidak lewat dari tujuh (7) hari dari tarikh surat ini.

Atas kerjasama Dato', kami ucapkan terima kasih.

Yang benar
—Sgd—

The ambitious floating city was divided for purposes of development into three parcels. In a preliminary enviromental impact assessment for the floating city prepared by Erinco Sdn Bhd dated January 1991 and exhibited as exh ARA3 (A)–(G), it was stated that:

> Under the project, a total area of 50.7 hectares (125.23 acres) of land shall be reclaimed in three parcels. The first, stretching from west of the Causeway up to Istana Besar Gardens is referred to as Parcel A. The reclamation area is proposed to accommodate a number of buildings for commercial use, hotels and cultural village. The area shall also function as an extension to the Central Business District (CDB) of Johor Bahru.
>
> Parcel B, the second reclamation parcel, is intended specifically for only the proposed road-widening of the coastal road to accommodate the projected increases in traffic volume. Approximately 1 hectare (2.47 acres) shall be reclaimed for such purposes.
>
> The third reclamation parcel covering an area of 23.38 hectares (57.75 acres) (Parcel C) shall extend from the waterfront opposite the Sultanah Aminah General Hospital and terminate at the harbour master's office. The area is intended for mainly residential land use comprising a number of blocks of condominiums and their associated facilities. In addition, a hotel and convention centre is also proposed to be sited on the development parcel.

However, the Dato' Bandar in his affidavit (encl 7) which was affirmed on 27 December 1994 and corrected by the corrective affidavit affirmed on 28 December 1994 (encl 8) deposed that the 'pembinaan yang sedang dijalankan oleh Johor Coastal Development Sdn Bhd adalah berkaitan dengan penyelebaran dan pembinaan Jalan Selat Tebrau untuk pihak Kerajaan Negeri dan tidak meliputi sebarang pembinaaan bangunan di atas tanah tersebut dan dengan demikian tidak bercanggah dengan

peruntukan s 70 Street, Drainage and Building Act 1974 dan byelaw 13(1) Uniform Building By-Laws 1984'. A

Encik Abdul Razak Ahmad took cudgel and strenously argued that what was deposed to by the Dato' Bandar in encl 7 was contrary to the report prepared by Erinco Sdn Bhd in regard to the floating city. He submitted that if the present development carried out by JCD was in B regard to the widening of the road at Jalan Selat Tebrau, why was there a need to instal electricity, water, gas, telecommunication and sewerage infrastructures as deposed to by the Dato' Bandar in his further affidavit (encl 12) affirmed on 20 January1995. It was further averred in encl 12 that buildings would be erected on the site once infrastructural works had been completed and this assertion runs counter to what was stated in C encl 7. Encik Abdul Razak Ahmad argued and it was his case that the infrastructural works carried out by JCD as described by the Dato' Bandar came within the meaning of the word 'building' in s 3 of the Street, Drainage and Building Act 1974 ('the Act') and since there was no prior written permission of the defendant, it contravened s 70 of the Act. For D ease of reference, the word 'building' is defined in s 3 of the Act as follows:

> 'building' includes any house, hut, shed or roofed enclosure, whether used for the purpose of a human habitation or otherwise, and also any wall, fence, platform, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge, or any structure support or foundation connected to the foregoing. E

Again, for convenience, s 70(1) of the Act is reproduced below:

> No person shall erect any building without the prior written permission of the local authority.

I might as well add that a building erected in contravention of s 70 of the F Act runs foul of the law and may be demolished (see s 72(1)(b) of the Act). In para 12 of encl 3, the plaintiff deposed that there was no special permission granted to JCD to commence building operations as provided for under byelaw 13(1) of the Uniform Building By-Laws 1984 and this point was again highlighted by Encik Abdul Razak Ahmad in the course of G his submission.

My attention was drawn to a passage appearing in the judgment of Haidar J in *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297 where his Lordship said, 'Though it would seem to appear that the project is in breach of the structure plan as the area of the project is H reserved for recreational facilities' and relying on this passage, Encik Abdul Razak Ahmad submitted that the floating city cannot be said to be the green lung as stipulated in the structure plan as the massive project undertaken there by JCD took it outside the scope of being the green lung for that area.

All said and done, the pertinent question to ask is this: Has the I plaintiff locus standi either at law or by statute to bring and maintain an action against the defendant?

The plaintiff said that he has locus standi and the factual situation expounded by Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242;

[1964] 2 All ER 929 at p 934; [1964] 3 WLR 573 at p 580 and as adopted by *Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12, and in the context of the plaintiff in the present case, was said to be:

(a) the plaintiff is a ratepayer in the city council of Johor Bahru; and

(b) he resides at No 26, Jalan Rubi, Taman Kolam Air, Johor Bahru, and according to him, near to the floating city and he has to ply that strech of the road, to and fro, to go to the city and, consequently, he says that he is exposed to the development there.

On these factual situations, the plaintiff submitted that he had a legitimate expectation that his letter to the Dato' Bandar be replied and he should not be left high and dry. Even an illegal immigrant was accorded an opportunity of being heard in *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; [1983] 2 All ER 346; [1983] 2 WLR 735 and as a Malaysian citizen, surely he was entitled to receive a reply from the Dato' Bandar, so submitted the plaintiff. But the facts in *A-G of Hong Kong v Ng Yuen Shiu* are poles apart from the present case. There the applicant who was born in China entered Hong Kong illegally from Macau in 1967. In 1976, he was removed to Macau but he re-entered illegally shortly afterwards and remained. By 1980, he was the part-owner of a small factory in Hong Kong. In October 1980, the Government announced changes in its immigration policy. It abandoned its 'reached base' policy whereby illegal entrants had been allowed to remain once they had reached the urban areas without being arrested and it stated that those who had entered illegally would be repatriated. It gave power to the Director of Immigration to make removal orders against them. The announcement created fears among the illegal entrants living in Hong Kong who had entered from Macau and who were of Chinese origin that they would be repatriated to China. On their petitioning the Governor, a senior immigration officer made an announcement of the Government's policy which it was intended should be applied to them. That included the statement that each illegal entrant from Macau would be interviewed and his case 'treated on its merits'. Having been questioned by an immigration officer, the applicant was detained and the Director of Immigration then made a removal order against him without giving him an opportunity of making any representations as to why he should not be removed. The applicant applied to the High Court for orders of certiorari to quash the removal order and prohibition restraining the Director from executing it. The full Bench of the High Court refused the application. On the applicant's appeal, the Court of Appeal granted an order of prohibition preventing the Director from executing the removal order until he had given the applicant an opportunity to be heard.

On the A-G's appeal to the Judicial Committee, it was held (dismissing the appeal) that where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty; that, accordingly, assuming that an alien had no

general right to be heard before being deported, the implementation of the promise to interview each illegal immigrant and decide each case on the merits required the applicant to be given an opportunity to state his case and the failure to ask him whether he wished to make representations why he should not be removed was a sufficient ground for setting aside the decision; and that accordingly, the court would substitute for the inappropriate order of prohibition an order of certiorari to quash the decision.

The plaintiff next relied on *Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor* [1994] 3 MLJ 640 where the plaintiffs there were said to have legitimate expectations to be notified of any development and have their objections heard and, using this as a leverage, the plaintiff argued that he too had a legitimate expectation of obtaining a reply to his letter addressed to the Dato' Bandar in his capacity as a ratepayer in the city council of Johor Bahru. But the plaintiffs in *Lee Freddie*'s case were owners and residents of three bungalows in the immediate vicinity of the proposed apartments scheduled to be built on the empty land. Whereas here, the plaintiff lived at Jalan Rubi, Taman Kolam Air which was some distance away from the floating city (see the location plan as per exh ARA2 in encl 3).

As a ratepayer and a road-user the plaintiff must show that his private rights have been infringed or if no private right has been infringed, he has suffered a special damage peculiar to himself over and above any infringement of his public rights before he can be vested with locus standi. Put in another way, the right to appear in court is given to the plaintiff if he is suing to enforce some private right or even some public right provided the interference with that public right causes direct damage to him. As a ratepayer, the plaintiff's house is not located near the floating city. In fact, it is located some miles away from it just like other ratepayers and in this regard the plaintiff has failed to show by evidence that he has suffered any special damage arising out of the alleged purported breach of the relevant law by the defendant. To give locus standi to a ratepayer like the plaintiff would open the floodgates and this would in turn stifle development in the country. There was no genuine private interest for the plaintiff to protect. He was more concerned about the publicity that went along with this case. As a lawyer, that kind of publicity must have been good to him. The Dato' Bandar aptly described him as a busybody. I venture to describe him as a trouble shooter, a maverick of a sort out to stir trouble.

As a road-user, the plaintiff argued that he was affected by the development of the floating city since he travelled along the beach front to proceed to his office. He forgot that other road-users also ply along that stretch of the road and, applying the *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, he cannot be said to be prevented from using other available internal roads to proceed to his office. There was and is always an option for him to select — the beach road or the internal road.

The plaintiff relied heavily on *Lim Cho Hock v Goverment of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148 and *Tan Sri Haji Othman Saat v Mohamed bin Ismail*

A [1982] 2 MLJ 177 to drive home the point that he too should be accorded locus standi. But these cases were described as 'the high-water marks of the law of locus standi in Malaysia' and that the plaintiffs in these cases 'had a genuine private interest to be furthered and protected' (see *Government of Malaysia v Lim Kit Siang*).

B *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156, *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor* [1994] 2 MLJ 297, *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh, Tan Sri Haji Othman Saat v Mohamed bin Ismail* and *Government of Malaysia v Lim Kit Siang* all show a singular trend and that trend is this: For a plaintiff to found an action C against the defendant who is a public body, he must show that he has suffered a peculiar damage by the alleged public wrong and that he has a genuine private interest to protect. Unfortunately, the plaintiff here failed to show by evidence that he has suffered any damage as a result of the construction of the floating city by JCD by way of nuisance or trespass D except to say that he was aggrieved as a taxpayer and a road-user. The Federal Court in *District Council Central, Province Wellesley v Yegappan* [1966] 2 MLJ 177 ruled that even assuming there were definite breaches of the relevant byelaws and sections of the Municipal Ordinance (Cap 133), an applicant for an order of certiorari to quash the decision of the District Council had no locus standi if he had not shown that any legal E right or interest belonging to him would have been affected by the approval of the building plans. Applying *Yegappan*'s case, even assuming that there were breaches of the relevant laws by the defendant when it gave its approval to JCD to develop the floating city, the plaintiff must positively show to the court that his legal right or interest would be affected by that F development before he can be said to have locus standi. This the plaintiff has failed to prove and, consequently, he has no locus standi in these proceedings.

The plaintiff would still be on flimsy ground in regard to prayer 3 of his originating summons in encl 4. The letter to the Dato' Bandar adverted G to the question as to whether notice had been given to the owners of the lands adjoining the floating city under s 21(6) of the Town and Country Planning Act 1976 which provides as follows:

> If the proposed development is located in an area in respect of which no development plan exists for the time being, then, upon receipt of an application for planning permission, or where directions have been given H under subsection (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them, inform the owners of the lands adjoining the land to which the application relates to their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

I The crucial word in s 21(6) of the Town and Country Planning Act 1976 is the word 'adjoining'. It is quite obvious that the plaintiff's house is not located on a piece of land adjoining the project undertaken by JCD and this is clearly reflected in the location plan (exh ARA2 of encl 3). The word 'adjoining' has been described in several fashions. Thus, Parke J, in

R v Hodges (1829) 173 ER 1182 defined it in this context: '... ground cannot be properly said to adjoin a house, unless it is absolutely contiguous'. Luxmoore J, in *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430 especially at p 440; [1934] All ER Rep 118 at p 123, said: 'When used in conjunction with the word 'land', the word 'adjoining' in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin.' Finally, Sir RH Sherwood in *MacDonald v Glasgow Corp* (1960) SLT 21 held in regard to adjoining land under the provisions of the UK Town and Country Planning Act 1947, s 10(3)(b) to mean the contours of land immediately adjoining the site in question.

By comparison, *The New Shorter Oxford English Dictionary* combined with 1 *Britannica World Language Dictionary* at p 23 defines the word 'adjoining' simply as 'lying next'.

It is quite difficult to construe the word adjoining favourably for the plaintiff for the simple reason that his house is far away from the floating city. Put bluntly, the plaintiff is not an adjoining landowner to enable him to assert positively that his legal position would be affected by the planning permission that was granted to JCD by the defendant. In this regard, *Lee Freddie*'s case is of no assistance to the plaintiff because on the facts it can easily be distinguished. As stated earlier, in *Lee Freddie*'s case, the plaintiffs there were the owners and residents of bungalows located in the immediate vicinity of the disputed project.

Even O 15 r 16 of the RHC which reads as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

does not exempt the plaintiff claiming declaratory relief from showing that he has locus standi to found his action (*Government of Malaysia v Lim Kit Siang, Tengku Jaafar bin Tengku Ahmad v Karpal Singh* and *Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor*). It is not incorrect to state, from a long line of authorities, that the power to make a binding declaration of right is a discretionary power (*Dyson v A-G* [1911] 1 KB 410, *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor* [1964] 1 WLR 219 and *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536; [1914–15] All ER Rep 24) and the applicant will not, as of right, be entitled to it. Another point that needs emphasis is this: a declaration can only be made after proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise (*Metzger & Ors v Department of Health and Social Security* [1977] 3 All ER 444 at p 451; [1978] 1 WLR 1046). Of pertinence too would be what was laid down in *Thorne Rural District Council v Bunting* [1972] Ch 470; [1972] 1 All ER 439; [1972] 2 WLR 517 to the effect that the remedy of declaration being wide and flexible will not be granted to a plaintiff whose claim is too indirect and insubstantial and would not relieve him from any disadvantage or difficulty.

Thus, the plaintiff lacking locus standi in law or by statute cannot ask for the declaration in prayer 1 of encl 4 to the effect that the planning

permission granted on 12 January 1994 was invalid as it contravened the Town and Country Planning Act 1976 or for that matter the commencement of the works by JCD was contrary and in breach of the Street, Drainage and Building Act 1974 read together with the Uniform Building By-Laws 1984 unless he can show positively and affirmatively that the alleged breaches have substantially caused damage to him personally (*Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 per Hashim Yeop Sani SCJ at pp 40–41). As a mere busybody and without standing, he was not entitled to receive a reply from the Dato' Bandar in regard to his letter dated 7 September 1994. The stringent requirement as propounded by Abdul Hamid CJ (as he then was) in *Government of Malaysia v Lim Kit Siang* where his Lordship said: 'Thus, in my view, there shall be a stringent requirement that the applicant ... to acquire locus standi has to establish infringement of a private right or the suffering of special damage' should be vigorously applied to the plaintiff in this case.

The defendant argued through his counsel that there was no material to show that the A-G, as the guardian and protector of public interest, has given his consent to support the plaintiff's originating summons in encl 4. In short, the defendant submitted that since this was not a relator action, the plaintiff must show his standing to commence encl 4. I agree and I must add that the plaintiff was trying to circumvent O 53 of the RHC when he sought for prayer 3 because that prayer was more in the nature of mandamus. The plaintiff must have thought that by seeking a declaration for prayer 3, he need not obtain the necessary leave as spelt out in O 53 of the RHC. It is apparent that it was an abuse of the process of the court for the plaintiff to proceed by way of an originating summons in encl 4 when he knew fully well that by so doing he would be bypassing the leave requirement as stipulated in O 53 of the RHC.

Incidentally, I was advised from the Bar by the defendant's counsel that the State Authority has since given its assent to the draft structure plan of the Johor Bahru City Council incorporating the floating city vide *Government Gazette* No 25, Jilid 38 dated 22 December 1994. The said structure plan was said to be operative from 8 June 1994. This meant that subsequent events have turned the colour of the case from blue to black. The case can be classified as hopeless as the proceedings which were viable when instituted have by reason of the happening of subsequent events become inescapably doomed to failure. As such, the originating summons in encl 4 amounted to nothing more than an abuse of the process of the court (*Domer v Gulf Oil (Great Britain)* Ltd (1975) 119 SJ 392).

For the reasons adumbrated above, I felt that this was a fit and proper case for me to exercise my discretionary powers under O 18 r 19(1)(a) and (d) of the RHC and, consequently, I ordered that the originating summons in encl 4 be struck out and dismissed with costs.

Originating summons struck out.

Reported by Sarojah Arianayagam